SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 110

HAROLD I. CAMMER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1955

CERTIORARI GRANTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joint Appendix

In the United States District Court for the District of Columbia Circuit

Miscellaneous No. 11-54

In Re Harold I. Cammer

Application for Order to Issue to Harold I. Cammer to Show Cause Why He Should Not Be Adjudged in Criminal Contempt of This Court—Filed May 10, 1954

Leo A. Rover, United States Attorney for the District of Columbia and appointed and directed by this Court to investigate this matter, applies to this Court for an order to issue to Harold I. Cammer to show cause why he should not be adjudged in criminal contempt of this Court. In support of this application, the said Leo A. Rover, alleges:

1. On August 28, 1953, an indictment, Criminal No. 1344-53, was returned against Ben Gold by the May 1953 grand jury of this Court charging him, as President of the International Fur and Leather Workers Union, with having filed with the National Labor Relations Board a false non-communist affidavit for the year 1950, in violation of 18 USC 1001. Harold I. Cammer is an attorney of record in the said case of *United States v. Ben Gold*, having entered an appearance therein as such attorney on August 31, 1953.

2. Harold I. Cammer is an attorney for Vera Taft, secretary to Ben Gold, President of the International Fur and [fol. 2] Leather Workers Union, and Pietro Lucchi, Treasurer of said Union. Miss Taft and Mr. Lucchi were subpoenaed to appear on September 22, 1953, and testify as witnesses and to produce certain documents before the May 1953 grand jury of this Court. Harold I. Cammer entered an appearance in this Court on or about September 22, 1953, to argue motions to quash and vacate the subpoenas issued

to said Taft and Lucchi. As a consequence of the proceedings on September 22, 1953, the appearances of the said Taft and Lucchi before the May 1953 grand jury were deferred and they have not yet appeared.

3. On and after September 22, 1953, Harold I. Cammer well knew that the May 1953 grand jury was continuing its investigation concerning other possible violations of 18 USC 1001, similar to the violations charged in the indictment in Criminal No. 1344-53.

4. On or about September 22, 1953, Harold I. Cammer, in his capacity as attorney for Ben Gold before this Court, mailed or caused to be mailed in New York City, New York, certain letters with identical questionnaires enclosed, addressed to certain members of the May 1953 grand jury of this court well knowing that said grand jury had returned the indictment against Ben Gold in Criminal No. 1344-53, and well knowing that said grand jury had subpoenaed Vera Taft and Pietro Lucchi as witnesses; and further well knowing that said grand jury had not been discharged and that its term had not expired.

5. On or about the 23rd day of September 1953, Harold I. Cammer caused to be delivered by the United States Post Office Department, certain letters with identical questionnaires enclosed, to certain members of the May 1953 grand jury of this Court at their homes and residences in the District of Columbia within the jurisdiction of this Court, well [fol. 3] knowing that said grand jury had not been discharged and that its term had not expired.

6. Harold I. Cammer, in mailing or causing to be mailed and in causing to be delivered the aforesaid letters and questionnaires to certain members of the aforesaid grand jury at their homes and residences, did so without the permission, consent, authorization, or knowledge of this Court at the time, well knowing that said grand jury had not been discharged and that its term had not expired.

7. The aforesaid letters and questionnaires are now in the possession and safekeeping of this Court and are specifically incorporated herein and made a part hereof by reference thereto. A copy of one such letter and questionnaire is attached hereto and made a part hereof.

8. The acts and conduct of Harold I. Cammer, as set forth in the foregoing paragraphs, constitute:

Misbehavior by an officer of this Court in his official transactions with this Court, in violation of section 401, Title 18 U. S. C.

Wherefore, petitioner respectfully requests this Court to issue an order to Harold I. Cammer to show cause why he should not be adjudged in criminal contempt of this Court as above alleged.

Respectfully submitted, Leo A. Rover, United States Attorney; Oliver Gasch, Principal Assistant, United States Attorney.

[fol. 4] EXHIBIT, ANNEXED TO APPLICATION FOR ORDER — Filed May 10, 1954

(Letterhead of)

HAROLD I. CAMMER

September 22, 1953.

Re: U. S. v. Gold

U. S. District Court for the District of Columbia
Criminal No. 1344-53

Dear Madam:

I am counsel for the defendant, Mr. Ben Gold, in the above-entitled proceeding. I am writing you and all of the other Federal government employees who sat on the Grand Jury which indicted Mr. Gold. I do this in the interest of the fair administration of criminal justice.

In an effort to learn the effect of the loyalty program on jurors from the Federal Government, I ask you please to answer the enclosed questionnaire as objectively as possible and return it to me as soon as possible. I am requesting the other grand jurors who are Federal government employees to do the same. The questionnaire does not seek, and I do not want any information concerning the proceedings or deliberations of the Grand Jury on which you sat.

Answering the questionnaire puts you to some unavoidable trouble. But it is, as you will know, your duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case.

A self-addressed stamped envelope is enclosed for your convenience. Promptness in your reply is important, and will be appreciated.

Sincerely yours, Harold L. Cammer.

Enclosure.
Special Delivery.
Registered Mail.
Ret: Rec. Req.

[fol. 5] Exhibit Annexed to Application for Order—Filed May 10, 1954

Questionnaire

In what department of the Federal Government are you employed?

Do your duties in any way involve you in the government's program against Communists and Communism?

Do you think that a government employee could get into trouble if he joined or contributed to an organization which supported something which he was for, and which he did not think had anything wrong with it, if the Department of Justice had declared the organization to be Communist? If so, why?

Do you think that a government employee might get into trouble if he did not drop a friend or acquaintance if he learned that he was suspected by the Department of Justice of communism?

Do you think that it is wise or safe for a government employee to express views on a controversial question different from the position of the Government?

Do you think a government employee might get into trouble if he owned or read a book which might be suspected of being a communist or left-wing book?

Do you think a government employee could get into trouble if he gave a truthful character affidavit for use at

a hearing in which the fellow employee is charged with disloyalty to his Government?

Do you think that a government employee could get into trouble if he defended a fellow government employee charged with disloyalty whom he knew to be innocent?

On the whole do you think that it was advisable, in the past six years, in view of the loyalty program, for government employees to take certain precautions, such as: (a) avoiding an acquaintance; (b) giving up a friendship; (c) resigning from an organization; (d) declining to join or make a contribution to an organization; (e) keeping his views on controversial questions to himself and close friends; (f) declining to help a government employee in a [fol. 6] loyalty proceedings, although he knows of nothing against him; (g) avoiding books, magazines and music that might be left-wing in nature or authorship; or (h) advising another fellow employee to do any of the foregoing? Please indicate whether any or all of these would be wise precautions, if so, why?

Are you involved in a loyalty proceeding? Have you ever been involved in such a proceeding?

Are you concerned about possible involvement in a loyalty proceeding in the future?

Do you believe that a government employee might someday have to explain his action in a loyalty proceeding if, as a juror, he voted to acquit or not to indict a person who was widely publicized as a past or present communist?

Do you believe that even if he did not become involved in a loyalty proceeding he might become involved in other difficulties? If so, what kind?

Do you think that such a vote might affect his employment status, in any way, such as possible promotions, assignments, or selection for layoff in the current reductions in force? If so, how?

Do you believe that a government employee's obligation to the Federal Government and to its program of fight communism would be consistent with his voting to acquit or refuse to indict a man officially charged by our Government with communist activity?

Would you be inclined to believe that the Department of Justice might be right when it charges someone with com-

communism, or that otherwise it would not be bothering an innocent person?

Did you mention to or discuss the receipt of this questionnaire with any attorney or representative of the Department of Justice or with your superiors on your job? If so, with whom?

If so, did you receive from them any suggestions as to whether you should reply to this questionnaire?

Dated ——— ———.

Signed: ——— ———.

———

[fol. 7] IN UNITED STATES DISTRICT COURT

ORDER OF CHIEF JUDGE LAWS, DATED MAY 10, 1954, DIRECTING HAROLD I. CAMMER TO SHOW CAUSE WHY HE SHOULD NOT BE ADJUDGED GUILTY OF CRIMINAL CONTEMPT—Filed May 10, 1954

Leo A. Rover, United States Attorney for the District of Columbia, appointed and directed by this Court to investigate this matter, having heretofore filed an application for an order to issue to Harold I. Cammer to show cause why he should not be adjudged in criminal contempt of this Court, and in support of the application having alleged that said Harold I. Cammer, as an officer of this Court, misbehaved in his official transactions with this Court, by communicating with certain members of the May 1953 Grand Jury of this Court in that he mailed or caused to be mailed and caused to be delivered to them certain letters together with enclosed questionnaires without the knowledge, consent, approval, or permission of this Court, said Grand Jury being then empanelled and not yet discharged or its term expired, and this fact being well known to the said Harold I. Cammer, a copy of which is attached hereto and made a part hereof; and

It appearing to this Court that good cause has been shown for issuance of such an order, it is hereby

Ordered that Harold I. Cammer, whose principal office is located at 9 East 40th Street, New York City, State of

New York, show cause, if any there be, on the 21st day of May, 1954, at 10 o'clock in the forenoon of that day in the United States Courthouse in the City of Washington in the District of Columbia, why he should not be adjudged guilty of criminal contempt of this Court, as aforesaid; and it is

[fol. 8] Further ordered that Leo A. Rover, United States Attorney for the District of Columbia, and Oliver Gasch, Assistant United States Attorney, be and they are hereby appointed to represent this Court in the instant matter.

Sufficient cause appearing therefor, let service of a copy of this order, together with a copy of the application annexed and filed herein, on the said Harold I. Cammer on or before the 17th day of May, 1954, be deemed good and sufficient service hereof.

Dated: May 10, 1954.

Bolitha J. Laws, United States District Judge.

In United States District Court

Answer of Harold I. Cammer—Filed May 20, 1954

* * * * * * * *

The defendant, Harold I. Cammer, by Charles E. Ford, his attorney, for his Answer to the Application for an Order to Show Cause herein:

I. Admits the allegations of paragraphs 1 through 7 of the application, but denies the allegations of paragraph 8 that the acts and conduct set forth in said paragraphs 1 through 7 constitute misbehavior by an officer of this Court in his official transactions with this Court in violation of Section 401, Title 18, U. S. C.

II. As and for a further defense to the application, defendant alleges:

[fol. 9] 1. On August 28, 1953, the May, 1953, Grand Jury of this Court returned an indictment against Ben Gold, (Criminal No. 1344-1953) charging him with having filed with the National Labor Relations Board a false non-com-

against affidavit on August 29, 1950, in violation of 18 U. S. C. 1001.

2. Defendant is a member of the bar of the State of New York having been admitted to practice in that State in April, 1933. Defendant was retained as attorney for said Gold and on August 31, 1953, filed an appearance pro hac vice as attorney for the defendant.

3. Upon information and belief, prior to the return of the aforementioned indictment against Gold, two grand juries of the United States District Court for the Southern District of New York, had investigated the same alleged offense but had returned no indictments.

4. Upon the arraignment of said Gold in this Court on September 4, 1953, a plea of not guilty was entered and Chief Judge Laws allowed thirty days for pre-trial motions with leave to apply for additional time upon a showing of need therefor.

5. Immediately after the arraignment of said Gold, defendant applied to and received from the Clerk of this Court a roster of the May, 1953, Grand Jury for the purpose of considering a motion pursuant to Rule 6(b)(2) of the Federal Rules of Criminal Procedure.

6. Upon inspection of such roster defendant learned that a majority, to wit, thirteen, of the members of said Grand Jury were government employees. Defendant thereupon gave consideration to a motion pursuant to said Rule 6(b)(2) to challenge the legal qualification of government employees to sit as grand jurors in a case involving charges of Communism in the face of the then regenerated loyalty and security program and the public castigation of those [fol. 10] accused of "coddling" Communists. Such question was accentuated by the fact that two prior grand juries in the City of New York, where government employees had not dominated, had returned no indictment in the Gold case.

7. Defendant undertook, within the time available, a careful and thorough study of the law respecting the qualifications of government employees in such a case and the appropriate means of presenting a challenge in accordance with the Rule. Such research disclosed that while such challenges had not infrequently been made, they had previously failed for lack of proof of bias in the particular

case." On the basis of such research, and particularly of his study of *Dennis v. United States*, 339 U. S. 162; *United States v. Wood*, 299 U. S. 123, and *Frazier v. United States*, 335 U. S. 497, defendant became convinced that, as was said in *Dennis*, "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury," and that "the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact."

8. Defendant thereupon undertook a study of the records and briefs in the two most recent cases in this Court involving such a challenge (*Emspak v. United States*, 203 F. (2d) 54, at 61; *United States v. Weinberg*, Criminal, 829-52) for the purpose of determining the appropriate means, in accordance with the rules and practice of this Court, whereby the suspected bias might be established as a fact.

9. Defendant ascertained that in *Emspak* the challenge had failed on the ground, urged by the United States Attorney for the District of Columbia, that a defendant desiring to challenge the qualifications of government employees as grand jurors was under a duty himself first to interview [fol. 11] such grand jurors for the purpose of determining whether bias did in fact exist before applying to the Court for relief, and that in the absence of such an effort and showing based thereon he was not entitled to a hearing. The Government's position was set forth in the *Emspak* brief to the Court of Appeals, at pp. 27-8, as follows:

> "The appellant in this motion was not only asserting that at least eight of the twelve members of the grand jury indicated in this motion were prejudiced and disqualified, but was promising to prove it if given the opportunity: *yet there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons.* Under all the circumstances it is clear that the court acted properly in denying the motion for a hearing. In the absence of any reason for appellant not making his whole showing in the usual form of affidavits, it can be asserted on this review that the trial judge had exclusive discretion to deny a hearing. *The appellant was trying to get the court*

to make an investigation which the appellant should have made himself." (Italics supplied.)

10. Defendant further learned that the same issue had been involved in the *Weinberg* case in which, in a bench ruling made November 17, 1952, Judge Kirkland of this Court had upheld the government's position that a defendant could not apply for a hearing as to the qualifications of government employees as grand jurors, unless he had first undertaken to "contact" them to ascertain preliminarily the existence of bias. Judge Kirkland stated that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members [of the grand jury] and inquiring only of one subject, whether or not they had any per- [fol. 12] sonal bias toward . . . [defendant] and on that account did they return the indictment." In this respect defendant respectfully refers to the motion challenging the grand jury in the *Weinberg* case, a certified copy of which is hereto annexed, marked Exhibit A.

11. Defendant also consulted with Dr. Marie Jahoda, Associate Professor of Social Psychology at the Graduate School of Arts and Sciences of New York University and Associate Director of the Research Center for Human Relations at the same school, who had recently co-authored with Dr. Stuart W. Cook, also of New York University, a study of the impact of the current loyalty and security measures upon the ability of government employees fairly to pass upon cases involving charges of communism. Such study had been published at 61 Yale Law Journal 295 *et seq.* and had earned her a research prize awarded by the American Psychological Association.

12. Defendant also consulted with Joseph A. Fanelli and Harry Rand, members of the bar of this Court with offices in the District of Columbia, who had been attorneys for the defendant in the *Weinberg* case, as to the appropriate means, in accordance with the rules and practice of this Court, of preparing and presenting such a challenge.

13. As a result of such consultations, research and deliberation, defendant rejected the notion of a personal interview with the grand jurors for the reasons that such an interview would not be sufficiently overt and might be

susceptible to misinterpretation. Defendant learned that in the *Weinberg* case, Messrs. Fanelli and Rand had undertaken to meet this problem by addressing to the government employees on the grand jury, in lieu of an interview, a questionnaire with reference to the impact of the loyalty and security programs upon their qualifications as grand jurors. Upon specific inquiry of Messrs. Fanelli and Rand, [fol. 13] defendant was advised that such a letter had been sent by them without the prior knowledge or authority of this Court, and that after such letter had been sent, the contents of such letter and accompanying questionnaire with the results thereof, were made known to this Court by a supplemental motion in support of a hearing as to the qualifications of the grand jurors and that no suggestion of criticism by reason of the sending of such letter had been made either by the Court (Holtzoff, J.) or by the government. Such letter and questionnaire are on file in the *Weinberg* case in this Court in support of said motion and certified copies thereof are annexed hereto, marked Exhibits B and C, and incorporated by reference.

14. Defendant relied in good faith upon the foregoing direct precedent and upon the suggestion contained in the United States Attorney's brief in *Emspak*, as aforesaid, the ruling of Judge Kirkland, and the acquiescence of Judge Holtzoff and the United States Attorney in the *Weinberg* case. He accordingly prepared a letter in the same form and language as composed by Messrs. Fanelli and Rand in the *Weinberg* case, a copy of which is on file in this Court, as aforesaid, and a similar questionnaire as propounded by them only reducing the length of the questionnaire. As so modified, defendant on his letterhead by registered mail, return receipt requested, addressed it to the government employees on the May, 19[illegible] Grand Jury which had returned the Gold indictment.

15. Within a few days after such letter and questionnaire were mailed, defendant was visited by agents of the Federal Bureau of Investigation concerning the matter and learned from them that such letter was the subject of investigation. Defendant disclosed the foregoing facts and circumstances to the agents and promptly addressed a letter again setting forth such facts and circumstances to

[fol. 14] Hon. David A. Pine, District Judge of this Court, before whom the matter had come. A copy of such letter is hereto annexed as Exhibit D and is hereby incorporated by reference.

16. Thereafter the time for motions in *United States* v. *Gold* was extended and on December 7, 1953, defendant filed a motion in said action for a hearing respecting the qualifications of the grand jury. In support of said motion defendant filed his affidavit setting forth that he had addressed such letter and questionnaire to the government employees who sat on the grand jury; that he had received no response and thereforo prayed for a hearing. A copy of such affidavit is annexed hereto as Exhibit E and incorporated by reference. In addition defendant submitted affidavits from Professors Jahoda and Cook as to their expert opinion with respect to the lack of qualification of government employees in such a case.

17. As appears from the face of the letter, defendant stated therein that "I do not seek, and I do not want any information concerning the proceedings on the grand jury on which you sat." The questions propounded in the questionnaire were consistent with such statements and such questions under the holding of *Morford* v. *United States*, 339 U.S. 258, were lawful and permissible and were not intended or calculated to and, upon information and belief, did not have the effect of and could not influence the grand jurors in their deliberations.

18. In his acts and conduct as aforesaid, defendant was actuated only by a desire properly to discharge his duties as counsel for a defendant in a criminal case subject to his duties and obligations as an officer of this Court. He attempted to act with scrupulous regard to his obligations as an officer of the Court on the basis of careful and diligent research into the substantive law and the specific [fol. 15] precedent in this Court, and then on the basis of a direct and specific precedent by members of the bar of this Court in a case where a prompt and full disclosure of the practice followed had been made to the Court and where no suggestion of impropriety has resulted. Defendant acted in good faith and under the exigencies of a need to prepare his motions in timely fashion. Defendant was at all times

direct and candid with the Court and took no covert or surreptitious action of any kind. If defendant violated any rules or practice of this Court, such violation was unknown to defendant and was unintended.

Wherefore defendant prays that the application be dismissed and the proceeding terminated.

Charles E. Ford, 416 Fifth Street, N.W., Washington, D. C., Attorney for Defendant.

(Verified by Harold I. Cammer, May 19, 1954.).

[fol. 16] Exhibit A, Annexed to Answer—Filed Feb. 24, 1953. Filed May 20, 1954

United States District Court for the District of Columbia

Criminal No. 829-52

United States of America

v.

Joseph W. Weinberg

Second and Supplemental Motion to Dismiss Indictment on Ground of Predominant Government-Employee Composition of Grand Jury, or in the Alternative for a Hearing to Ascertain Bias of Government Employee Grand Jurors

Comes now the defendant by his counsel herein and respectfully moves the Court to dismiss the indictment herein on the ground of the predominant government-employee composition of the grand jury; or in the alternative to grant a *voir dire* hearing so that the bias of government-employee grand jurors may be ascertained. For reasons in support of this motion it is respectfully stated that:

1. As the record in this case discloses, fifteen of the twenty-three grand jurors who considered this case and returned the indictment against defendant were employees of the Federal government.

[fol. 17] 2. In view of this predominant government-employee composition of the grand jury and the nature of this case, defendant, in motions heretofore filed in this proceeding, requested that the Court dismiss the indictment as having been returned by an improperly constituted grand jury or grant a *voir dire* hearing to determine whether such government employees were biased because of the impact of the loyalty and security programs on government employees. The Court is respectfully referred to the affidavits annexed to the prior motion to dismiss, which affidavits are incorporated herein and made a part hereof.

3. After argument, Judge Kirkland denied those motions. Judge Kirkland, however, stated that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members and inquiring only of one subject, whether or not they had any personal bias toward * * * (defendant) and on that account, did they return the indictment."

4. In accordance with the suggestion of Judge Kirkland, defendant's counsel sent each of the fifteen government-employee grand jurors, by registered mail, a letter and questionnaire, true copies of which are annexed hereto. Defendant's counsel has been advised by the Post Office Department that all these letters have been delivered; and the registered mail return receipts are annexed hereto.

5. In response to these letters, defendant's counsel has received only one letter from the grand juror, Maurice J. Orler, a true copy of which is annexed hereto. That grand juror expressly declined to fill out the questionnaire. The other fourteen grand jurors did not answer at all.

6. Defendant respectfully suggests that the failure of the fifteen government-employee grand jurors to respond to defendant's questionnaire on bias is in and of itself [fol. 18] indicative of the present pressure upon government-employee grand jurors in a case of this kind resulting from the many aspects of the Federal government's loyalty-security program.

7. Defendant respectfully urges that the incompetence of Federal government employees to sit on a grand jury in a case of this type is shown as a matter of law by the affidavits and documents submitted in support of this motion. On this showing and on the showing already made

of record, it is earnestly submitted that defendant did not receive the impartial and fair consideration of a grand jury as was his constitutional right. And that, accordingly the indictment herein must be dismissed.

S. If, nevertheless, the Court believes that additional proof of the government employee disqualification is necessary, defendant should be afforded the opportunity to make such proof at an appropriate hearing to which the government employee grand jurors may be summoned. Judge Kirkland's suggestion was carried out and found not feasible. It is plain that the only way in which defendant and this Court can ascertain the full extent to which the loyalty-security program of the Federal government rendered government employees incompetent to sit on the grand jury in this case is by hearing under the supervision and with the assistance of the Court.

Respectfully submitted, (S.) Joseph A. Fanelli, Harry I. Rand, Wyatt Building, Washington, D. C., Attorneys for Defendant.

[fol. 19] Exhibit B, Annexed to Answer—Filed May 20, 1954

STerling 3-1540

Joseph A. Fanelli
Attorney at Law

Wyatt Building—777 Fourteenth Street, N. W.
Washington 5, D. C.

February 11, 1953.

Registered Mail
Ret. Rec. Req.

Re: U. S. v. Weinberg, U. S. District Court for the District of Columbia, Criminal No. 829—52.

Dear Sir:

As counsel for the defendant, Dr. Weinberg, in the above-entitled proceeding, I am writing you and all of the other

Federal Government employees who sat on the Grand Jury which indicted Dr. Weinberg for perjury. I do this in aid of the administration of justice.

In an effort to show the impingement of the loyalty program on jurors from the Federal Government, I ask you please to answer the enclosed questionnaire as objectively as possible and return it to me as soon as possible. I am requesting the other grand jurors who are Federal government employees to do the same. The questionnaire does not seek, and I do not want any information concerning the proceedings of the Grand Jury on which you sat.

Answering the questionnaire puts you to some unavoidable trouble. But if is, as you will know, your duty as a [fol. 20] citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case.

Promptness in your reply is important, and will be appreciated.

Sincerely yours, Joseph A. Fanelli.

Enclosure

EXHIBIT C, ANNEXED TO ANSWER—Filed May 20, 1954

Questionnaire

Are you an employee of the Federal Government?

Would you as a government employee join an organization which the U. S. Department of Justice has declared to be a communist organization? If not, why?

Would you as a government employee feel some reluctance in joining or contributing to any organization? If so, why?

Would you as a government employee in any way associate with a man suspected by the Department of Justice of communism? If not, why?

Would you as government employee associate in any way with a man whom you suspect but do not know to be a communist? If not, why?

If your views on a controversial question differed from the position of your Government would you as a government employee feel free to express such views to a fellow Federal employee? If not, why?

Considering that the position of your Government may

change in the future, would you feel free to express your views on a controversial question to a fellow government [fol. 21] employee, even though your views do not differ from your Government's position?

Would you as a government employee own or read a book which might be suspected of being a communist or left-wing book? If not, why? If you were to read such a book by accident would you feel free to speak of it to a fellow government employee? If not, why?

Would you as a government employee listen to music originally composed and played in the U.S.S.R.? If not, why?

Would you be reluctant to give a Federal government employee a truthful character affidavit for his use at a hearing in which he is charged with disloyalty to his Government? If so, why?

If you believed a fellow government employee charged with disloyalty to be innocent, would you freely express your belief to others? If not, why?

Have you in the past five years, and with the Government's loyalty program in mind, (a) avoided an acquaintance; (b) given up a friendship; (c) resigned from an organization; (d) declined to join or make a contribution to an organization; (e) kept your views on controversial questions to yourself and close friends; (f) declined to help a government employee in a loyalty proceeding, although you know of nothing against him; (g) avoided books, magazines and music that might be left-wing in nature or authorship; or (h) advised another fellow employee to do any of the foregoing? If yes to any of the foregoing, why?

Are you now personally involved in a government loyalty proceeding? Have you ever been personally involved in a government loyalty proceeding? If so, would you mind going through another one? If not, why?

Are you concerned about personal involvement in a government loyalty proceeding in the future?

[fol. 22] Do you believe that if you sit as a juror in this case and vote for an aquittal, you might some day have to explain that action in a government loyalty proceeding?

Do you believe that your obligation to the Federal Government as a government employee would be consistent with your voting to acquit a man officially charged by your

Government with perjury concerning communist activity?

Do you feel, in view of your status as a government employee and the operation of the government loyalty program, that you can be absolutely impartial as a juror in this case where your Government officially charges the defendant with perjury concerning communist activity?

Would you be inclined to believe that a committee of the U. S. Congress must be right when it charges someone with communism, or that otherwise the charge would not be made?

Would you be inclined to believe that an indictment for perjury concerning communist activity must be right, or otherwise the Grand Jury would not be bothering an innocent man?

Do you think that the United States Government would not charge a man with perjury concerning communist activity unless he was guilty?

Signed:

A True Copy

Test: 5-19-54

Harry M. Hull, Clerk, By Frances Betanesurt, Deputy Clerk.

[fol. 23] Exhibit D, Annexed to Answer—Filed May 20, 1954

(Letterhead of)
Harold L. Cammer

October 2, 1953

Hon. David A. Pine,
United States District Judge,
United States Courthouse,
John Marshall Place and
Constitution Avenue,
Washington, D. C.

Re: United States v. Gold, Criminal No. 1344-53.

Honorable Sir:

I have just obtained a transcript of the proceedings which occurred in your Court last Thursday, September

24, 1953, in connection with a letter I had written to those members of the grand jury which returned the indictment in this case who are employed by the federal government. Since you characterized this as a grave matter, I hasten to submit a statement of the circumstances under which the letter was sent so that you may have all of the facts.

The indictment in this case charges the filing of an affidavit under the Taft Hartley Law which falsely denied membership in or affiliation with the Communist Party, or support of any organization which advocates forcible overthrow of the Government. Two grand juries in New York had previously investigated the charges now made but had failed to indict. A majority of the members of the grand jury in the District of Columbia which returned the indictment were government employees.

[fol. 24] In the cases where the Supreme Court had upheld the qualifications of government workers to sit as jurors in criminal cases in the District of Columbia, it had emphasized that it was always open to a defendant to show their lack of qualification in a particular case. *United States* v. *Wood*, 299 U. S. 123; *Frazier* v. *United States*, 335 U. S. 497; *Dennis* v. *United States*, 339 U. S. 162.

In *Wood* Chief Justice Hughes said that "in dealing with an employee of the Government the Court would properly be solicitous to discover whether in view of the nature or circumstances of his employment or of the relation of the particular Government activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him" (at p. 134). And in *Dennis*, the Court said "that the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact" (at p. 168).

Under the circumstances, it seemed necessary and appropriate to determine whether government employees were qualified, in terms of freedom from bias and fear, to act in a case where official charges of communism were being made.

In view of the current loyalty programs, this question has been much litigated recently and the reported decisions point to the necessity and importance of direct inquiry as to the particular jurors' freedom from bias or fear.

In *Morford v. United States*, 339 U. S. 258, the Supreme Court held that defense counsel had the right to question prospective government employee jurors with specific reference to the possible influence of the loyalty program on their ability to render a just and impartial verdict. In the recently decided cases of *United States v. Quinn*, *United States v. Emspak*, in 203 Fed. 2nd, a majority of the Court of Appeals for the District of Columbia upheld the denial [fol. 25] of a hearing as to the qualification of the grand jurors who were employed by the government since the prosecutions for contempt of Congress there involved presented essentially only questions of law. But the majority pointed out that "the grand jury was not called upon to evaluate the probabilities of a doubtful *prima facie* case, or of a charge in the realm of opinion or controversy" (at p. 60).

The present case does involve sharply disputed issues of fact around a charge in the realm of opinion or controversy. The impartiality of the federal employees who sat on the grand jury is critical in such a case. The government has consistently urged that proof of a general climate of fear induced by the loyalty program is insufficient and that a hearing should not be granted without proof of bias or fear on the part of the particular grand jurors. In its brief to the Court of Appeals in *Emspak*, for example, it criticized the adequacy of the defense showing there made because "there is not the slightest indication in the long motion offer of proof that an attempt had been made to interview a single one of the persons" (Case No. 10943, at p. 28).

In the subsequent case of *United States v. Weinberg*, tried in the District Court before Judge Holtzoff, counsel for the defendant, in support of a motion for a hearing and apparently upon the suggestion of Judge Kirkland, who accepted the government's view as to the showing which had to be made, addressed a letter to the grand jurors employed by the federal government in which he enclosed a five page questionnaire designed to determine the impact of the loyalty program upon their qualifications.

This letter and questionnaire were thereafter submitted to Judge Holtzoff in support of the application for a hearing. At no time was there any suggestion by the Court, or by [fol. 26] the government, that the letter and questionnaire were improper.

The letter sent by counsel in the *Weinberg* case is in the files of the District Court. I adopted and copies the form and language of that letter in my letter almost word for word. The questionnaire is also substantially the same, except that I reduced it from five pages to two.

My letter was sent on the basis of the specific precedent in the *Weinberg* case in an effort to meet the standard set by the government itself in the *Emspak* case. Because of the danger of misunderstanding, I did not think it wise, however, to seek to interview the grand jurors personally and selected the method of a letter instead.

On Thursday, September 24, 1953, before I knew of the proceedings before the Court, I was visited in my office by agents of the Federal Bureau of Investigation with respect to the letter and made to them a full statement substantially the same as I am reporting to Your Honor.

It is scarcely necessary to assure Your Honor that I had no intention to influence the grand jury. My letter stated that "the questionnaire does not seek and I do not want any information concerning the proceedings or deliberations of the Grand Jury on which you sat". I cannot comprehend how questions of the character which I sent, addressed solely to the impact of the loyalty program on their qualifications as grand jurors, could possibly influence their judgment. In this connection, I should like to call Your Honor's attention to Rule 6(b)(1) of the Rules of Criminal Procedure which provides that challenges to the qualifications of grand jurors may be made even before they consider the matter. And Rule 6(b)(2) provides for such a challenge after their consideration of the matter has been completed.

[fol. 27] I trust that the foregoing satisfactorily explains the matter to Your Honor, particularly since, as a guest in your Court, I am especially anxious to avoid any suggestion of impropriety.

A copy of this letter is being sent to Mr. Lowther.

Respectfully yours,

HIC:AW
ftul/1283

cc: Hon. Joseph A. Lowther, Department of Justice, Washington, D. C.

[fol. 28] EXHIBIT E, ANNEXED TO ANSWER—Filed May 20, 1954

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 1344-53

UNITED STATES OF AMERICA

v.

BEN GOLD

AFFIDAVIT OF HAROLD I. CAMMER

CITY OF NEW YORK,
County of New York, ss:

HAROLD I. CAMMER, being duly sworn, deposes and says:

1. I am one of the counsel for the defendant in the above-captioned case.

2. In connection with my study of the question of the qualifications of government employees to sit on the grand jury in a case such as the defendant's, I learned that the government had argued to the Court of Appeals in the case of Emspak v. United States that "there is not the slightest indication in the long motion and offer of proof that an attempt had been made to interview a single one of the persons." I also learned that in the case of United States v. Weinberg, counsel for the defendant, acting on a suggestion by Judge Kirkland, addressed a letter to the govern-[fol. 29] ment employees who were grand jurors in that case attaching a five page questionnaire designed to determine the impact of the loyalty and security program upon their qualifications.

3. In accordance with these suggestions, I prepared a letter and questionnaire which I modelled after the questionnaire in the Weinberg case and which I then sent to all of the government employees who were grand jurors in the case of the present defendant. I am attaching a copy of this letter and questionnaire.

4. This letter and questionnaire was sent to all of the government employees who were grand jurors by registered mail, return receipt requested. I received from the post office return receipts which indicated that all of these letters were duly received by the addressees. I have not, however, received any response to any of these letters or questionnaires.

5. Upon the basis of this experience, I am certain that it is impossible to carry out an investigation of this nature except as a result of a court ordered hearing with an opportunity to address questions to the grand jurors in open court.

Harold I. Cammer.

Subscribed and sworn to before me this — day of December, 1953. ———

[fol. 30] IN UNITED STATES DISTRICT COURT

ORDER OF JUDGE MORRIS CONTINUING HEARING—Filed May 21, 1954

This cause came on for hearing on the order of this Court to show cause why defendant Harold I. Cammer should not be adjudged in criminal contempt of this Court, and it appearing to the Court that defendant did, on May 20, 1954, file an answer with exhibits attached thereto, and it further appearing to the Court that in paragraph one of the answer defendant Cammer has admitted the allegations contained in paragraphs one through seven of the Government's application for an order to show cause, and has in the subsequent paragraphs thereof stated his explanation of his conduct, thereby leaving for the Court's resolu-

tion only the legal issue as to whether the admitted conduct of the defendant constitutes a violation of Section 401(2) of Title 18 USC, it is, upon the the consent of the respective parties,

ORDERED that legal memoranda in support of the respective positions of the parties be filed on or before June 1, 1954, and

IT IS FURTHER ORDERED that the hearing on the order to show cause be, and the same hereby is continued to June 4, 1954, at 10:00 a.m.

Jas. W. Morris, Judge.

Consent:

OLIVER GASCH,
Oliver Gasch,
Assistant United States Attorney.

CHARLES E. FORD,
Charles E. Ford,
Attorney for Defendant.

[fol. 31] IN UNITED STATES DISTRICT COURT

ORDER ADJUDICATING DEFENDANT GUILTY AND APPROVING CASH BOND PENDING APPEAL, OF CHIEF JUDGE LAWS—Filed June 21, 1954

Upon consideration of the application filed herein by Leo A. Rover, United States Attorney in and for the District of Columbia, charging defendant Harold I. Cammer with contempt of court in violation of 18 United States Code, Section 401 (2), and upon the order signed by this Court requiring defendant Harold I. Cammer to show cause why he should not be held in contempt of court and the sworn answer of defendant Harold I. Cammer filed herein and upon consideration of the undisputed facts disclosed by the pleadings, and counsel for the defendant and the United States Attorney having filed legal memoranda and having been heard orally in support of their respective positions, and the Court being fully advised, it is this 21st day of June, 1954,

Ordered and adjudged that the defendant Harold I. Cammer be and he is hereby found guilty of contempt of court in violation of Title 18, Section 401 (2), United States Code, and he is hereby fined the sum of One Hundred Dollars ($100.00) with leave however to post One Hundred Dollars ($100.00) as a cash bond pending appeal.

Bolitha J. Laws, Judge.

Seen: Charles E. Ford.

Presented by: Oliver Gasch.

[fol. 32] In United States District Court

Memorandum of Chief Judge Laws of June 15, 1954—Filed July 20, 1954

Before the oral hearing of this case, the Court gave study to the briefs filed by counsel. It also listened attentively to arguments of counsel at the hearing. Nothing has changed its understanding that whenever a case is pending before judge or jury, no pressure or harrassment of any character should be exercised on one who must make a decision. Unfortunately within late years there has been a tendency to bring such pressures and harrassment. For a time, there was picketing of courts during trials. Then there came about unseemly conduct of counsel in court, requiring disciplining of counsel. Now it appears searching questionnaires have been submitted to grand jurors while they are considering certain types of cases.

It has never occurred to me a lawyer would not know the evil of such practices. In the case now before the Court, it has been argued that counsel for one indicted wished to ascertain whether certain grand jurors were biased; that this Court had allowed only thirty days for this purpose; and timely action had to be taken. That if suggestion had been made to the Court there was reasonable indication of partiality of grand jurors but due to pendency of similar charges before these jurors the investigation could not then be explored, the Court, if convinced of good faith, unques-

tionably, would have postponed the time for filing motions until all indictments were filed and opportunity to ascertain the status of jurors had been afforded.

There is a decided difference between questioning jurors after they have concluded their services and questioning jurors when they are actively hearing or considering a case. To harrass them by challenging and lengthy questions [fols. 33-34] while they are deliberating or about to consider cases is intolerable. A timid juror will not fail to be disturbed, possibly influenced. A stalwart juror at least will be disturbed. Such an approach impinges freedom of thought and decision. Jurors will not serve competently if so harrassed.

While the Court finds there is no question as to the impropriety of what respondent has done, it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong. There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not. Under these circumstances, in the absence of a positive declaration by the Court, it may be unjust to severely punish respondent as otherwise would be required. Granting respondent all favorable inferences, his acts clearly disregarded the protection which must be vouchsafed jurors. The Court finds him guilty of contempt and imposes a fine of $100.

Bolitha J. Laws, C. J.

June 15, 1954.

[fol. 35] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12353

HAROLD I. CAMMER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

OPINION—Decided May 5, 1955

Mr. Charles E. Ford for appellant.

Mr. Oliver Gasch, Assistant United States Attorney, with whom Messrs. Leo A. Rover, United States Attorney, and Lewis Carroll, Assistant United States Attorney, were on the brief, for appellee.

Before Wilbur K. Miller, Fahy and Danaher, Circuit Judges

DANAHER, Circuit Judge:

Cammer appeals from an order adjudging him guilty of criminal contempt. The essential facts are that Cammer is attorney of record for one Gold; on August 28, 1953, an indictment was returned against Gold by the May 1953 grand jury; the grand jury after Gold's indictment subpoenaed other persons represented by Cammer; on September 22, 1953, Cammer appeared in the District Court on behalf of these other persons and moved to quash and vacate the subpoenas served upon them; on this same day and the day following, September 22 and 23, 1953, Cammer sent identical letters and questionnaires to some [fol. 36] fifteen members of the grand jury who were federal employees, and in so doing, Cammer acted without the permission or knowledge of the District Court. The questionnaires related in general to the effects of the government's loyalty program on the grand jurors. The letter accompanying the questionnaire stated that it was being submitted "in the interest of the fair administration of criminal justice" and urged that it was the recipient's

"duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case."

The trial judge found that the questionnaires harassed the jurors and impinged upon their freedom of thought and decision. He described Cammer's action as "intolerable" but concluded that a fine of $100 would be sufficient punishment since there was some doubt as to whether Cammer's acts "were committed in conscious wrong."

Cammer's contempt was adjudged specifically under § 401 of the Federal Contempt Statute, 18 U.S.C. § 401 (1952),[1] which provides as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

[fol. 37] The government's application for an order to show cause was predicated upon acts and conduct said to constitute a violation of subsection (2) of the foregoing section. Although appellant set up certain defenses which will not be detailed, his answer admitted all allegations of the government's petition except the following:

> "The acts and conduct of Harold I. Cammer, as set forth in the foregoing paragraphs, constitute:
>
> "Misbehavior by an officer of this Court in his official transactions with this Court, in violation of section 401, Title 18 U.S.C."

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[1] Although Nye v. United States, 313 U.S. 33 (1941), involves a complaint for violation of the first subsection of 18 U.S.C. § 401, at page 44 *et seq.* is presented important background material. Earlier treatment of the derivation of the statute is presented by Mr. Justice Harlan in Savin, Petitioner, 131 U.S. 267; 274 *et seq.* (1889).

The power of Congress to legislate with respect to the contempt powers of the federal courts other than the Supreme Court, is not open to question. "These courts were created by acts of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted." *Ex parte Robinson*, 19 Wall. 505, 510-511 (U.S. 1873). The contempt statute has been described as an attempt by Congress "drastically" to limit the contempt powers of the courts. *In re Michael*, 326 U.S. 224, 227 (1945); *Nye v. United States*, 313 U.S. 33, 44-48 (1941). The *Michael* and *Nye* cases emphasize, however, that the main concern of Congress and the Supreme Court is not to protect contemptuous conduct, but to prevent abuses which may result from summary punishment.

Under the terms of 18 U.S.C. § 401 (2), we inquire whether: (1) Cammer was an officer of the court, (2) engaged in an official transaction, (3) whose conduct constituted misbehavior. For the reasons which follow, the majority answers these questions affirmatively, though with great respect for the contrary views of our colleague.

[fol. 38] 1. *Cammer was an officer of the court.*

It seems clear that attorneys are officers of the court within the intendment of the statute. In *Ex parte Garland*, 4 Wall. 333, 378 (U.S. 1866), Justice Field said: "[Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." See also, *Ex parte Robinson*, 19 Wall. 505, 512 (U.S. 1873); *Ex parte Bradley*, 7 Wall. 364, 374 (U.S. 1868); and *Tanner*

v. *United States*, 62 F. 2d 601 (10th Cir. 1932), *cert. denied*, 289 U.S. 746 (1933), all of which involved contempt situations.[2]

2. *Cammer was engaged in an official transaction.*

That Cammer, as an "officer of the court," was engaged in an official transaction is clear. The facts show beyond dispute that Cammer's actions occurred while he was directly engaged "in the practice of the profession." *Ex parte Bradley*, *supra*, 7 Wall. at 374. The grand jury had just indicted one of his clients, and as he knew, currently had others under investigation. Each letter identified Cammer as attorney for the indicted client, Gold, and [fol. 39] stated that he was addressing it to all federal government employees " who sat on the Grand Jury which indicted Mr. Gold." Cammer's letter, appealing directly to the grand jurors' purported duty " to help enlighten the court," transmitted a questionnaire containing inquiries, a few samples of which will demonstrate its inevitable impact on the grand jurors.[3]

[fol. 40] The grand jury is an appendage of the court and "proceedings before it are to be regarded as being proceedings in the court." *Cimarola* v. *United States*, 111 F.

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[2] No point is made of the fact that the District Court admitted Cammer only *pro hac vice*. This would appear to be immaterial since the alleged contempt occurred in connection with the specific cases in which he was authorized to appear. See Bowles v. United States, 50 F. 2d 848, 851 (4th Cir. 1931), *cert. denied*, 284 U.S. 648 (1931).

[3] "In what department of the Federal Government are you employed?

. . . . . .

"Do you think it is wise or safe for a government employee to express views on a controversial question different from the position of the Government?

. . . . . .

"Do you think a government employee could get into trouble if he gave a truthful character affidavit for use at

2d 243, 246 (3d Cir. 1940), *cert denied*, 311 U.S. 651 (1940). See also, *United States v. Smyth*, 104 F. Supp. 283, 291 (N.D. Cal. 1952). The grand jury acts "under the authority of the court," we note in *Savin, Petitioner*, 131 U.S. 267, 277 (1889), which predicated Justice Cardoza's pronouncements "A talesman when accepted as a juror becomes a part or a member of the court," *Clark v. United States*, 289 U.S. 1, 11 (1933), and again at page 12, "A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints." That Cammer, in so communicating with an official arm of the court while conducting the court's business, was engaged in an official transaction cannot be doubted.

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a hearing in which the fellow employee is charged with disloyalty to his Government?

* * * * * * *

"Are you involved in a loyalty proceeding? Have you ever been involved in such a proceeding?

"Are you *concerned* about possible involvement in a loyalty proceeding in the future?

"Do you believe that a government employee might some day have to explain his action in a loyalty proceeding if, as a juror, he voted to acquit or not to indict a person who was widely publicized as a past or present communist?

* * * * * * * *

"Do you think that such a vote might affect his employment status in any way, such as possible promotions, assignments, or selection for layoff in the current reductions in force? If so, how?

"Do you believe that a government employee's obligation to the Federal Government and to its program of fight communism would be consistent with his voting to acquit or refuse to indict a man officially charged by our Government with communist activity?

* * * * * * *

"Did you mention to or discuss the receipt of this questionnaire with any attorney or representative of the Department of Justice or with your superiors on your job? If so, with whom?"

In urging that the statute does not apply in such circumstances appellant relies on the *Nye*, *Michael* and second *Schmidt* (124 F. 2d 177 (6th Cir. 1941)) cases. The *Nye* proceedings, brought under the *first* subsection of 18 U.S.C. § 401, did not involve an officer of the court, and the alleged contemnors, in fact, were not even parties to the litigation. The Court's opinion stated, 313 U.S. at 44: "The question is whether the conduct of petitioners constituted 'misbehavior . . . so near' the presence of the court 'as to obstruct the administration of justice'. . . ." Concluding that the words have a geographical connotation, the majority ruled that the reprehensible conduct was not punishable as contempt within the meaning of § 401(1) though of a kind which corrupts the judicial process and impedes the administration of justice. The case on its facts has nothing to do with our problem. In the *Michael* [fol. 41] case, *supra*, the contemnor, a court appointed trustee, had been adjudged guilty of contempt because of "false and evasive" testimony before a grand jury. The issues were not unlike those presented in *Ex parte Hudgings*, 249 U.S. 378 (1919). The Court noted that perjury alone does not constitute an "obstruction" of justice within § 401(1), and that element must be clearly shown where contempt is charged. The opinion cited *Clark v. United States*, *supra*, as an example of obstruction where a prospective juror had falsely testified in order to qualify. "It is difficult to conceive of a more effective obstruction to the judicial process that a juror who has prejudged the case," wrote Justice Black, 326 U.S. at 228, pointing out further that "the mere fact that false swearing is an incident to the obstruction charged does not immunize the culprit from contempt proceedings." But perjury alone did not predicate contempt proceedings under § 401(1), nor could the conviction be sustained under § 401(2) where the contemnor, though an officer of the court, was not engaged in an official transaction while testifying generally before the grand jury. In short, where the charge of perjury could be prosecuted with determination of guilt by a jury, that course, rather than summary contempt action, should be followed where there was lacking the element of obstruction of justice. The *Michael* case offers no comfort to one who either sought to influence the jury as it trans-

acted its business, or whose insinuating and unauthorized communications might have affected the grand jury's official consideration of the case against Cammer's clients.[4] In the second *Schmidt* case, as is clear from the facts [fol. 42] which appear in the court's first opinion (115 F. 2d 394), the court again was concerned primarily with the first rather than the second subsection of 18 U.S.C. § 401. In fact, it was stated in open court by the Government that no complaint was made in that case under the second subsection. Moreover, while attorneys were involved, they did not themselves make contacts with grand jurors, and their alleged contempts occurred when the court was not in session and grew out of actions they advised the clients to take. In brief, the cases relied upon by appellant may be distinguished, and none involves direct dealing between two officers of the court in a matter of official concern to both, as in the present situation.

3. Cammer's conduct constituted misbehavior.

For many practical reasons the courts have sought to protect grand juries in the exercise of their historic and important function, investing their deliberations with the seal of secrecy, protecting the jurors against harassment and otherwise recognizing their valued contributions in judicial administration.[5] Thus has evolved the rule re-

[4] Cf. Remmer v. United States, 347 U.S. 227, 229 (1954), where the Court said: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. . . . A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. . . ."

[5] E.g., a defendant should not be permitted to "divert and turn back the course of a criminal case from a trial of himself to a trial of the grand jury and the prosecuting

[fol. 43] quiring judicial approval of proposals to penetrate the shield. *Schmidt v. United States*, 115 F. 2d 394, 397 (6th Cir. 1940); and cases there cited. See also, *United States v. American Medical Ass'n*, 26 F. Supp. 429 (D.D.C. 1939); *In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952).[5]

Canner cast aside an unusually convenient opportunity to consult with the judge about his contemplated action when, while attorney for Gold who had been indicted, he appeared before the court on the morning of the very day the questionnaires were sent out. He there sought to quash a subpoena duces tecum running to one of Gold's associates, and he knew that the grand jury was continuing its investigation. If he had acted in good faith, he could then have sought judicial supervision, instead of which he went forward with his plan, kept it secret to himself, acted without advice from the court, and yet implied in his letter that it was the jurors' "duty" to the court to respond to the questionnaires.

The record here amply substantiates a finding of misbehavior. As Judge Laws said in his opinion: "To harass [the jurors] by challenging and lengthy questions while they are deliberating or about to consider cases is intoler-

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officers." United States v. American Medical Ass'n, 26 F. Supp. 429 (D.D.C. 1939); United States v. Smyth, 104 F. Supp. 283, 300-302 (N.D. Cal. 1952); cf. Bradley v. Fisher, 13 Wall. 335, 347-348 (U.S. 1871); Atwell v. United States, 162 Fed. 97, 100 (4th Cir. 1908).

[5] In the latter case, by the way, the reasons for secrecy are summarized as follows: "1. To prevent the escape of those indicted; 2. To insure the grand jury freedom in its deliberations; 3. To prevent any persons from annoying the grand jurors; 4. To prevent subornation of perjury with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; 5. To encourage free and untrammeled disclosures by persons who have some information with respect to the commission of crimes; and, 6. To protect the innocent person, who is accused but exonerated, from the disclosure of the fact that he has been under investigation." See also, United States v. Amazon Industrial Chemical Corp., 55 F. 2d 254, 261 (D. Md. 1931).

able. A timid juror will not fail to be disturbed, possibly [fol. 44] influenced. A stalwart juror at least will be disturbed. Such an approach impinges freedom of thought and decision. Jurors will not serve competently if so harassed." Conduct similar in principle to that involved here has been condemned in many other cases.

In *Sinclair v. United States*, 279 U.S. 749, 765 (1929), the defendants in a criminal case had the jurors kept under surveillance whenever they were not actually within the court house. Investigations also were made concerning encumbrances on the home of one juror and to determine whether another had indicated his views during the trial. The Court upheld an adjudication of criminal contempt on these facts, even though it did not appear that any juror had actually been approached or communicated with or that any juror was conscious of the surveillance, although some jurors were suspicious. The punishment included heavy fines and imprisonment. Commenting on the conduct of the contemnors, the Court said (279 U.S. at 764-765):

> "That the acts here disclosed, and for which three of the appellants were certainly responsible, tended to obstruct the honest and fair administration of justice we cannot doubt. The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law. The most exemplary resent having their footsteps dogged by private detectives. All know that men who accept such employment commonly lack fine scruples, often wilfully misrepresent innocent conduct and manufacture charges. The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will [fol. 45] either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable

juries, in important cases, probably would become an impossibility. . . . We can discover no reasons for emasculating the power of courts to protect themselves against this odious thing."

In *Ex parte Bradley*, 7 Wall. 364, 374 (U.S. 1868), the Court reversed a contempt adjudication against an attorney which had been premised on the first clause of the first section of the Act of March 2, 1831, which is the equivalent of 18 U.S.C. § 401(1). In so doing, however, the Court markedly contrasted the power of the courts under like circumstances "to punish attorneys as officers of the same, for misbehavior in the practice of the profession." With respect to this latter power, Mr. Justice Nelson speaking for the Court said (7 Wall. at 374):

> "This power has been recognized and enforced ever since the organization of courts and the admission of attorneys to practice therein. If guilty of fraud against their clients, or of stirring up litigation by corrupt devices, or using the forms of law to further the ends of injustice; in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court. Indeed, in every instance where an attorney is charged by affidavit with fraud or malpractice in his profession, contrary to the principles of justice and common honesty, the court, on motion, will order him to appear and answer, and deal with him according as the facts may appear in the case. . . . [T]his is a distinct head of proceeding from that of contempt of court, or of the members thereof, committed in open court, or in immediate view and presence, tending to interrupt its proceedings, or to impair the respect due to its authority. *This distinction is recognized in the act of 1831, already referred to, which, after providing for personal contempt in presence of the court, authorizes attachments to issue, and summary punishment to be inflicted, for 'the mis-*[fol. 46] *behavior of the officers of said courts in their official transactions.'*" (Emphasis supplied.)

In *Tanner v. United States*, 62 F. 2d 601 (10th Cir. 1933), *cert. denied*, 289 U.S. 746 (1933), an attorney after the jury returned its verdict in a case in which he was participating, encountered one of the jurors and proceeded to abuse the juror, who was a banker, for the small amount of damages awarded his client in the trial. The lawyer was adjudged in contempt, was fined $100, and suspended from practice until payment was made. The Court of Appeals upheld this conviction and made this pertinent comment (62 F. 2d at 602):

> "While the jury had returned a verdict in the Woody case in which the juror had sat, he was still an officer of the court and would be called in subsequent cases. Appellant also was an officer of the court. The attack having been made by one officer of the court upon another because of the subject matter of a trial concluded only so far as the return of a verdict by the jury, we are of the opinion while the attack was made outside of the courtroom and after the jury had returned its verdict, yet the case was still pending, and it was not only the right but the duty of the court to deal with the same. It is unthinkable a court should be so weak or supine, so wanting in constitutional power, as to not be able to protect its officers in the proper discharge of their sworn duty. That a juror, acting under his sworn duty in the administration of justice in one of our national courts, should be so basely accused and humiliated by an interested officer of the court cannot be thought not to be included in the statutory law above quoted. No doubt jurors, if such conduct as is found in this record should go unpunished, would fear to do their sworn duty in an honest, impartial manner, as must be done in the administration of justice in our courts. We are of the opinion the judgment imposed for the offense by the attorney in this case was well within the statutory [fol. 47] power conferred. Aside from this the court was very moderate in his punishment, and for that the court is to be commended and not criticized for its timely action in this case."

In the first *Schmidt* case, *supra*, 115 F. 2d 394 (6th Cir. 1940), several attorneys advised their clients that they could interrogate members of the grand jury relative to the evidence which had been submitted to it, and upon which indictments against them were based. The clients thereupon approached and interviewed a number of the grand jurors, and obtained affidavits which the attorneys submitted to the court in support of motions to quash the indictments. The attorneys were adjudged in contempt of court for their conduct. Commenting upon the attorneys' actions, the court said (115 F. 2d at 396:

> "The question of sincerity aside, the fact is that appellants' advice overlooked this oath and caused their clients and the grand jurors themselves to disregard it. The advice was given directly in the teeth of that clause of the oath which obligated the jurors to secrecy unless they were called upon in a court of justice to make disclosures, and of that portion of the court's charge to the grand jury hereinabove quoted. Advice which caused appellants' clients or the jurors themselves to disregard or ignore the oath was, per se, an unlawful interference with the proceedings of the court, and, however honestly given, was at least a technical contempt."[5]

[5] See also the exhaustive opinion of Chief Judge Fee in United States v. Smyth, 104 F. Supp. 283, 302-304 (N. D. Cal. 1952), in which he indicated that it would be contempt under 18 U. S. C. § 401 for an attorney, without a court order, to interrogate grand jurors about their motives or personal habits; and In re Grand Jury Proceedings, 4 F. Supp. 283 (E. D. Penn. 1933), which also indicates that a court order is necessary in order to avoid contempt in questioning grand jurors.

[fol. 48] Cammer urges upon us his alleged lack of intent, that there was an absence of conscious wrong. His reliance upon any such ground for exculpation is definitely misplaced. "In order that one may be held for contempt for communications with jurors, on the ground of the harmful tendency thereof, it is not necessary to prove that the

communications had or the acts done were accompanied with a wrongful intent. It is sufficient if such acts and communications were knowingly and wilfully done and had, and had the tendency to influence improperly the action of the jury." *Kelly v. United States*, 250 Fed. 947, 950 (9th Cir. 1918), *cert. denied*, 248 U.S. 585 (1919). In *Burke v. United States*, 90 F. 2d 840 (4th Cir. 1937), *cert. denied*, 302 U.S. 685 (1937), which arose under a statute which now appears at 18 U.S.C. § 1504 (1952), the defendant was charged with improperly communicating with a grand jury. Rejecting as a matter of law the defense that he had acted "openly and without corrupt intent," the court said that under the facts of the case "the only question which can arise under the statute is whether the person accused of sending the letter did so. Every one is presumed to intend the natural and probable consequences of acts intentionally done." Once we find, as we do, that Cammer's conduct tended to harass the grand jurors, it is immaterial whether Cammer was motivated by an evil purpose, or not, but were we pressed on the point we could readily find that he was.

We are not unmindful that "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed. . . ." *Cooke v. United States*, 267 U.S. 517, 538 (1925). Here the appellant had the full benefit of whatever mitigating circumstances could properly be urged in the light of the facts. The *Cooke* case requires no more. See also, *Merrimack River Sav. Bk. v. Clay Center*, 219 U.S. 527, 536 [fol. 49] (1911); *Schmidt v. United States*, 115 F. 2d 394, 398 (6th Cir. 1940).

Chief Judge Laws concluded: "Granting respondent all favorable inferences, his acts clearly disregarded the protection which must be vouchsafed jurors. The Court finds him guilty of contempt and imposes a fine of $100."

The judgment is affirmed.

FAHY, *Circuit Judge, dissenting*: The question is the narrow one whether the conduct for which appellant was adjudged by the court guilty of criminal contempt was that of an officer of the court in an official transaction.

The only authority invoked to support the judgment is 18 U.S.C. § 401(2) (1952), empowering a court of the United States "to punish by fine or imprisonment such contempt of its authority" "and none other, as * * * (2) Misbehavior of any of its officers in their official transactions * * *." I assume the conduct was misbehavior within the meaning of this provision. And, of course, appellant as a member of the bar is an officer of the court. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378; *Savings Bank* v. *Ward*, 100 U.S. 195, 198; *Powell* v. *Alabama*, 287 U.S. 45, 73; *Hickman* v. *Taylor*, 329 U.S. 495, 510;[1] *Booth* v. *Fletcher*, 69 App. D.C. 351, 355, 101 F. 2d 676, 680, *cert. denied*, 307 U.S. 628. But when he communicated by mail with grand jurors to obtain information in preparing his client's case he was not engaging in an official transaction as an officer of the court. In other words, I do not think Congress intended by § 401(2) to grant courts the power by summary proceedings to police such professional behavior of a member of the bar. The well known avenues for sus- [fol. 50] pending, disbarring, or otherwise disciplining attorneys are available to reach their unprofessional and unethical conduct. The criminal law is available to punish them for criminal offenses, where they "will be afforded the normal safeguards surrounding criminal prosecutions." *Nye* v. *United States*, 313 U.S. 33, 53.[2] And contempt proceedings are also available to punish "[m]isbehavior of any person" in the court's presence or "so near thereto as to obstruct the administration of justice," or "[d]isobedience or resistance to" the court's "lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(1) and (3) (1952). But the language of § 401(2), "[m]isbehavior of" court officers "in their official transactions," is not apt wording to include a broad sweep of professional behavior of attorneys not in the presence of the court or "so near thereto as to obstruct the administration of justice." The language no doubt does apply to the official conduct

[1] For subsequent history see *Hickman* v. *Taylor*, 170 F. 2d 327 (3d Cir.), *cert. denied*, 336 U.S. 906.

[2] For subsequent history see *Nye* v. *United States*, 137 F. 2d 73 (4th Cir.), *cert. denied*, 320 U.S. 755.

of officers of the court, such, for example, as the clerk and marshal; and to referees, trustees, masters and attorneys in special capacities. Summary power to punish them might have been thought necessary to enable a court to function with propriety and integrity. But to construe § 401(2) to include the conduct here in question is to draw into the words "official transactions" of "officers" of the court an undefined and vague area of the professional activity of an attorney. This is not the ordinary meaning of the language and we should not, in view of *Nye* v. *United States*, *supra*, extend its meaning beyond the ordinary. Unless the requirements of the statute are clearly satisfied, "an offense will be dealt with as the law deals with the run of illegal acts", *ibid.*, 313 U.S. at p. 51, and not by summary procedure without the protection of the Bill of Rights.

[fol. 51] *Ex parte Bradley*, 74 U.S. (7 Wall.) 364, lends some support to the view of the majority. But the question in its present context was not there decided, and the opinion must now be read in the light of *Nye* v. *United States*, *supra*. See, also, the recent decision in *Offutt* v. *United States*, 348 U.S. 11, 14.

It must be remembered that the seriousness of the behavior, or the fact that it involved grand jurors, does not make it the behavior of a court officer in an official transaction. See *Schmidt* v. *United States*, 124 F. 2d 177 (6th Cir.) which, however, should be read with the earlier case of *Schmidt* v. *United States*, 115 F. 2d 394 (6th Cir.). The official status of the grand jurors is not in question, only the official character of appellant's own status and behavior. I think *Farese* v. *United States*, 209 F. 2d 312 (1st Cir.), particularly at p. 315, and the implications of *In re Michael*, 326 U.S. 324, also support my view that the judgment should be reversed.

[fols. 52-53] UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD I. CAMMER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Fahy and Danaher, Circuit Judges.

JUDGMENT—May 5, 1955

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: May 5, 1955.

Per Circuit Judge Danaher.

Separate dissenting opinion by Circuit Judge Fahy.

[fol. 54] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 110

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.